

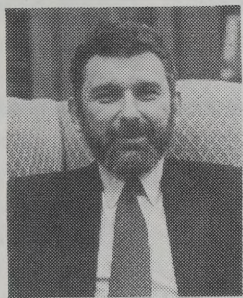
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NEWSLETTER

Vol. 1 Issue 1

Summer 1988

Commissioner's Message



Sidney B. Linden

This column will be a regular feature of our newsletter. I intend to use it as a vehicle for discussion of timely and important issues we will all be facing as freedom of information and protection of privacy become realities in Ontario.

The *Freedom of Information and Protection of Privacy Act* came into effect on January 1, 1988. From time to time, the *Act* may be referred to as the "Freedom of Information Act", the "Privacy Act", or the "Access Act". Such abbreviations may serve convenience, but what should not be lost sight of is the fact that the *Act* incorporates both freedom of information and protection of privacy.

Other jurisdictions have legislated two separate acts, recognizing that freedom of information and protection of privacy reflect two distinct concepts and values. Ontario has adopted a different approach. The Ontario *Act* explicitly recognizes that the values of privacy and access to information will often conflict and that only within the framework of one act can both values be properly balanced. Achieving this balance is the responsibility and challenge of this Office.

What is privacy?

One of the *Act's* purposes is "to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information". How does the *Act* protect your personal information? Ontario government institutions must follow strict guidelines about the collection and use of personal information and, gen-

erally, are prohibited from disclosing personal information about an individual to someone else. In other words, you cannot see my personal information and I cannot see yours.

However, the *Act* recognizes that there are circumstances when access to your personal information by others is both appropriate and justifiable, and it sets out a variety of situations when the government can disclose someone's personal information to a third party. Where such disclosure of personal information is sanctioned, the *Act* is careful not to permit indiscriminate disclosure.

What is freedom of information?

In the context of the Ontario *Act*, "freedom of information" as an idea is translated into a positive right - every person has a right of access to government records. However, just as with the right to privacy, the *Act* incorporates exemptions to this general rule. The exemptions explicitly recognize that certain information contained in government records can be legitimately withheld from disclosure. For example, one of these exemptions deals with personal information and requires that personal information may not be released to a third party unless the information fits certain criteria, as set out in the *Act*, permitting disclosure.

Balancing access and privacy

It may be helpful to illustrate the difficulties raised by the *Act's* dual concern with freedom of information and protection of privacy and by the need to balance the competing values inherent in these concepts.

A record, for example, that is a study of the effects of some government program may be based on personal information gathered from a segment of the Ontario population.

Should one have access to the personal information contained in a government study that deals with the effectiveness of a particular government program? Such a study is intended to be publicly accessible under the *Act*, but should it be withheld because it contains personal information? If the two values of freedom of information and privacy are absolute, how can the issue of disclosure be resolved?

The authors of the legislation clearly intended that these two values be balanced in such a way that both are given their proper weight. How can this be done?

The *Act* provides a method for achieving balance. Thus, in our example, a solution may be to delete or sever those sections of the study containing personal information. In this way, the remaining portions of the study could be released and made accessible.

The Ontario *Act*, in encompassing both values of freedom of information and protection of personal privacy, compels those who wish to use the *Act*, and those who have to administer it, to be mindful of the fact that freedom of information and protection of personal privacy must be constantly kept "in balance".

The Appeal Process

Subsection 50(1) of the *Act* gives a person who has made a request for:

- access to general records;
- access to personal information;
- correction of personal information; or
- a third party who has been given notice of a request for access to general records

the right to appeal any decision of a head under the *Act* to the Commissioner.

After an appeal is filed, an Appeals Officer is assigned to the case. The Appeals Officer's first job is to ascertain the issues arising from the appeal and the respective positions of the parties. The Appeals Officer contacts both the requestor and the government representative in an attempt to eliminate any misunderstandings and to determine whether there is any prospect of settlement through mediation. If settlement is not possible or only partially successful, the appeal proceeds to an inquiry. It is at this stage that the Appeals Officer prepares a report which sets out the facts and issues arising from the appeal.

Once the inquiry stage is reached, a Notice of Inquiry letter is sent to the parties informing them that the inquiry portion of the appeal process has begun. The Appeals Officer's report accompanies this initial Notice, and the parties are advised of their

right to make representations to the Commissioner with respect to the issues arising from the appeal. Although the Appeals Officer's report sets out issues arising from the appeal as identified by the Commissioner's Office, the parties are free to address any other issues in their submissions.

The initial Notice of Inquiry letter also informs all parties of the Commissioner's practise to receive written submissions. The letter also sets out a date by which a party may contact the Commissioner's Office to request that representations be made other than in writing. If no such request is received by the date set out in the initial Notice of Inquiry letter, a second letter is sent to the parties. This second letter confirms that representations are to be made in writing and sets out the date by which they are to be received by the Commissioner's Office. If oral submissions are to be made, the date for making them is also contained in this second letter.

The submissions of the parties are reviewed and if further representations are required, they are requested. As soon as the Commissioner has all the necessary information he prepares a written order, a copy of which is sent to each party.

The *Act* contains authority for an inquiry to be conducted in private. It also permits the Commissioner to meet with the parties

separately, and provides him with authority to deny parties an opportunity for cross examination or to comment on each others' submissions. The operation of the *Statutory Powers Procedure Act* is also specifically excluded. These are important and unusual provisions in the *Freedom of Information and Protection of Privacy Act*, and their inclusion is significant. The existence of these special procedures emphasizes the special nature of the subject matter that the *Act* addresses, which requires a unique and special inquiry procedure. If conventional procedures were followed, in many cases the "issue in dispute" would be revealed and the whole point of the appeal would become redundant. There will be appeals where the circumstances warrant a more public inquiry. This request may come from the parties or it may be initiated by the Commissioner, and the *Act* allows for a public inquiry when circumstances warrant.

The appeal process is evolving and may be changed as experience dictates. It is expected that the process will always begin with an attempt to mediate the issues in dispute. This will be followed by a formal commencement of the inquiry process and the request for representations. In appropriate cases, oral representations will be heard, and in some cases all or part of the inquiry may be conducted in public. This flexibility in the appeal process to meet the needs of the particular case is necessary, especially at the outset.

A regular feature of our newsletter will be a summary of orders issued by the Commissioner. We hope this will provide interested readers, both inside and outside the government, with an opportunity to monitor decisions as the Act evolves.

Immediately following the issuance of an order by the Commissioner, a summary is prepared by the Legal Services Branch. Each summary consists of an outline of issues raised by the appeal, the positions taken by the parties, and the reasons for the Commissioner's decision. In some more lengthy cases this summary is further reduced for the newsletter, while in others it is published in its entirety. A copy of the summary and the full text of each order are available from the Commissioner's Office upon request.

For this first issue of the newsletter, we thought it would be beneficial to provide the above outline of the process leading to the issuance of an order. This is followed by the summaries of orders issued to date.

Summaries of Orders

Summary (Appeal #880070)

The Appellant applied to the Ministry of Government Services requesting a copy of "The Metro Toronto Property Review", a study by Eli Comay of Comay Planning Consultants. Access was denied pursuant to subsection 22(b) of the *Freedom of Information and Protection of Privacy Act* on the basis that there were reasonable grounds to believe the report would be published and publicly available within ninety (90) days from the date of the request. The Appellant appealed the denial of earlier access.

The Commissioner upheld the decision of the head. In coming to this conclusion, he noted the purpose of the *Act* in subsection 1(a) is "to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public, that necessary exemptions from the rights of access should be limited and specific....". The Commissioner also noted that "...the burden of proof that the record or the part falls within one of the specified exemptions in this *Act* lies upon the head." (s. 53)

The Appellant submitted in the grounds of appeal that early release of the report would benefit the public debate over the government's housing policy plans. The Appellant cited section 23 of the *Act* which provides that exemptions under sections 13, 15, 17, 18, 20 and 21 do not apply where a "compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption." Subsection 22(b) is not one of the exemptions set out in section 23.

Submissions received from the head confirmed that "the information requested will be available" prior to the end of the ninety (90) day period provided for in subsection 22(b) of the *Act*. The submissions also indicated that it was the "intention to release the report to all interested parties on an equal basis, at cost."

The report was released by the Ministry on May 31, 1988, two days in advance of the expiry of the 90-day period.

Summary (Appeal #880003)

The Appellant applied to Ontario Hydro requesting access to the Board of Directors' minutes for 1986 and 1987. The institution provided the Appellant with a fee estimate of \$120.00 for the requested records. The fees notification also explained that providing access to original records "was not reasonable in the circumstances, as the records required severing and original Board Minutes cannot leave Head Office". The Appellant appealed the decision to charge a fee and the amount of the fee, as well as the decision not to make the record available for examination in Ottawa.

The Appellant also applied for a waiver of fees based on subsection 57(3)(c) of the *Freedom of Information and Protection of Privacy Act*. The institution denied the Appellant's request for a waiver of fees.

The Commissioner upheld the decision of the head not to allow the Appellant to examine the record or parts thereof under subsection 30(2) of the *Act*. In coming to this conclusion, the Commissioner agreed with the head's submission that it was not "reasonably practicable" to permit the Appellant to examine the record because it was subject to substantial amounts of severing, pursuant to subsection 10(2) of the *Act*.

...it is important that all institutions covered by the Act apply a consistent set of guidelines which reflect the institution's rationale for charging fees.

Having found it not reasonably practicable in the circumstances of the case to provide an opportunity to examine the record, the Commissioner found it unnecessary to address the issue of where the record might be examined. However, he did not preclude the possibility that, in proper circumstances, arrangements could be made for transfer of a record to make examination by a requester more convenient.

The Commissioner upheld the decision of the head to follow subsection 5(1) of Ontario Regulation 532/87, as amended, to charge \$.20 per page for photocopying of the record.

However, the Commissioner suggested that the fee of \$.20 per page be viewed as a maximum and suggested that the institution make an effort to determine the actual cost of photocopying. He stated the importance of an institution making every effort to prevent fees from being used as a deterrent or impediment to the use of the *Act*.

The Appellant claimed that fees should be waived pursuant to subsection 57(3)(c) of the *Act*. While the Commissioner acknowledged that no definition of the term "benefit public health or safety" exists in the *Act*, he asserted that it does not mean that fees will be waived where a record simply contains some information relating to health or safety matters.

While it had no bearing on the determination in this case, the Appellant requested that the Commissioner consider the issue of a threshold or minimum fee. Ontario Regulation 532/87, recently amended, allows a head to waive any fee where the amount of payment would be \$5.00 or less.

The Commissioner stated that it is important that all institutions covered by the *Act* apply a consistent set of guidelines which reflect the institution's rationale for charging fees. The Commissioner believes this rationale to be the recovery of some of the costs of the administration of the *Act* and the assurance that people who use the *Act* assume their fair share of costs.

To this end, the institution should determine the point at which the administrative cost of collecting fees exceeds the amount of the fees claimed, and that figure should be used as a threshold or minimum fee for all institutions. While there has not yet been sufficient experience to make this determination, the Commissioner urged the government to undertake this effort. The Commissioner underscored the importance of establishing a fair and consistent fee policy while at the same time guarding against fees being used to deter users of the *Act*.

Summaries of Orders

Summary (Appeal #880031)

The Appellant applied to the Ministry of Education (the Institution) requesting access to "a study on the Sacred Heart Roman Catholic School in Sioux Lookout" prepared by consulting engineers Keewatin-Aski Limited for the Dryden District Roman Catholic Separate School Board (the School Board). Access was denied pursuant to subsections 17(1)(c) and 18(1)(d) of the *Freedom of Information and Protection of Privacy Act*. The Appellant appealed the denial of access.

...neither the Institution nor the School Board had discharged the onus of proving that this portion of the report fell within one of the specified exemptions of the Act.

During the mediation/investigation stage of the appeal, a narrowing of the issues was achieved. The Appellant indicated his interest was confined to information contained in the report about asbestos and fire safety problems present in the school. Consequently, the subject of this appeal was the portion of the report in which these issues were addressed.

As a preliminary matter, the Commissioner found that the report was in the custody or under the control of the Institution. In coming to this conclusion, he noted that the report was submitted by the School Board to the Institution in support of a request for an allocation under the Institution's Capital Grant Plan. In addition, the Institution submitted that "it is unlikely that a request for money for work to be done on a school would be considered without an engineer's report."

The Commissioner ordered the disclosure of the portion of the report addressing asbestos and fire safety, as he found that neither the Institution nor the School Board had discharged the onus of proving that this portion of the report fell within one of the specified exemptions of the *Act*.

Subsection 17(1)(c) Exemption

The Commissioner set out the three-fold test which must be met in order for information to fall within the exemption.

1. In finding that the information contained in the report was technical in nature, the Commissioner was satisfied that the portion of the report at issue fit within one of the categories of information set out in subsection 17(1).
2. After examining the circumstances surrounding the creation and use of the

report, the Commissioner found that the report was supplied to the Institution in confidence implicitly. The School Board submitted that it received the report at an *in camera* session. The School Board has not released the report to the public. The Institution submitted that since the report was kept in confidence by the School Board and sent as supporting information with respect to the grant program, the Institution felt that it should respect the School Board's wishes and hold the report in confidence.

3. The final question addressed was whether there would be any undue loss or gain suffered by disclosure of the portion of the report requested. The Commissioner came to the conclusion that disclosure could not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

Subsection 18(1)(d) Exemption

The Commissioner found that there was insufficient evidence to conclude that disclosure of the portions of the report dealing with asbestos and fire safety could reasonably be expected to be injurious to the financial interest of the Government of Ontario and accordingly ordered the relevant portions of the report be released within 20 days of making the order.

"...it is part of my task not merely to recognize certain philosophical principles but also to get down to reality, translate those principles into decisions that are just, and actions that are fair and workable."

— Extract from Commissioner's speech to the annual luncheon meeting of the Data Base Association, Toronto, June 15, 1988.

"... this new Act creates in Ontario a new approach to the use of information that is in government records. Openness is the new watchword, but it is clearly openness balanced with due regard for the protection of privacy."

— Extract from Commissioner's remarks to delegates to a business conference on "The New Access to Information Laws" at The Old Mill, Toronto, June 16, 1988.

Commissioner's Office Security

We thought it would be useful to outline the steps the Commissioner's Office has taken to deal with the very important issue of adequately protecting the security of information which comes into our possession under the provisions of the *Freedom of Information and Protection of Privacy Act*.

We have addressed security from two basic perspectives: ensuring that information is held in strict confidence by employees of the Commissioner's Office; and implementing physical security measures at our office location.

Employees

All permanent, contract and temporary staff are required to sign an undertaking that they not disclose any information acquired during the course of their employment. They are also required to swear an Oath of Office and Secrecy and an Oath of Allegiance. In addition, the Commissioner meets personally with each new employee and reinforces the importance of confidentiality.

We have also been in touch with the Security Branch of the Ontario Provincial Police regarding pre-employment security clearances for all new staff. The Branch is currently reviewing their security clearance procedures, and as soon as that process is finalized, the OPP has agreed to institute a clearance procedure for all existing and future staff of the Commissioner's Office.

Physical Security

The Security Branch was also asked to inspect our suite of offices and recommend any changes required to ensure adequate physical security. This review has been completed, and we are now in the process of implementing changes suggested by the OPP.

Among the security measures are the following:

- installation of a card access system for entry to the offices;
- installation of high security Medco door locks;
- creation of a secure file room within the offices, equipped with a code entry lock, high security individual filing cabinet padlocks, and an infra-red motion detector connected to an alarm system during off-hours;
- an alarm system for each entry door for off-hours;
- duress buttons for the reception area and interview rooms;
- 2-sided locks for all individual office doors;
- installation of a door separating the reception area from the rest of the office, controlled by card access.

Both equipment purchase and construction modifications are underway, and we expect implementation of the security system to be completed by the end of July.

In the interim, we have established a number of procedures to ensure security protection.

- All confidential records are kept in a designated filing cabinet which is padlocked each evening.
- A "clean desk" policy has been implemented, whereby all important documents that are not stored in the secure filing cabinet are locked in individual desk drawers before leaving the office.
- A log of all visitors to our offices is maintained at the reception desk, containing the time of arrival and departure and the staff person having responsibility for the visitor.
- A policy has been established whereby all visitors must be accompanied by a staff person at all times. Visitors must be greeted in the reception area and escorted back to that area when leaving.

When the security system is fully implemented, we feel confident we will be able to provide a security level equivalent or superior to that in place at various Ministries and Agencies. We have even gone as far as barring the building security and cleaning staff from the premises, and will restrict access by the landlord to emergency situations.

We hope this outline is helpful. If any reader would like to have further details please contact our Office.

"This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest..."

— President Lyndon B. Johnson, upon signing the 1966 Freedom of Information Act.

Organization of the Commissioner's Office

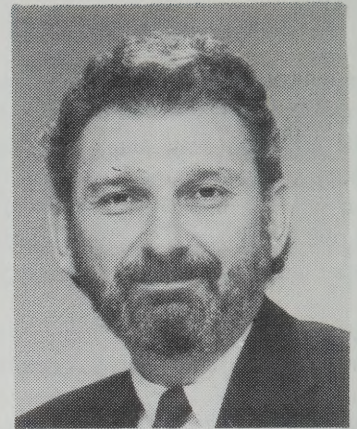
Sidney Linden is Ontario's Information and Privacy Commissioner, responsible for ensuring that ministries and agencies of the province comply with the *Freedom of Information and Protection of Privacy Act* and apply the standards of privacy protection set out in the law. As Commissioner, he reviews decisions made by government institutions where access to information has been denied to a member of the public. Under the *Act*, the Commissioner has the power to order disclosure.

Previously, Mr. Linden was Executive Director of the Canadian Auto Workers' Legal Services Plan where he laid the foundation for the establishment of Ontario's first major prepaid legal services scheme.

Mr. Linden also served as the first Public Complaints Commissioner and Chairman of the Police Complaints Board. In this role, he established and administered a new system for handling complaints against the Metropolitan Toronto Police Force.

Mr. Linden who was appointed Queen's counsel in 1978 has also practised criminal and administrative law in Toronto and worked as a labour arbitrator, serving as Chairman on numerous boards of arbitration throughout Ontario.

He also acted as the first full-time General Counsel and Executive Director to the Canadian Civil Liberties Association and is a past Vice-President of the Criminal Lawyers Association. Mr. Linden was also active on the Legal Aid Committee of the Law Society of Upper Canada for a number of years, and acted as counsel to the Director of Accounts on Appeals.



SIDNEY B. LINDEN
Commissioner

The Commissioner's Office has a complement of 34 full time positions, 25 of which have been filled to date. The Office is organized into 3 branches: Legal Services; Compliance; and Administration. The following outline briefly identifies the roles and responsibilities of each branch.

Legal Services

The Legal Services Branch provides all required legal support to the Commissioner's Office. Staff are responsible for processing all appeals made to the Commissioner under the *Act*, including mediation and investigation of cases involving denial of access, third party information, and personal information. The Branch also prepares legal opinions on behalf of the Commission including comments on the information and privacy implications of proposed and existing legislation.

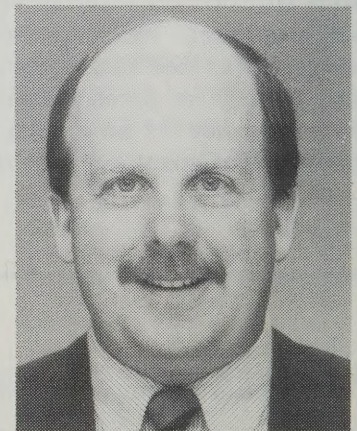
The Legal Services Branch consists of 2 units:

Appeals

At present six Appeals Officers, under the supervision of a Manager of Appeals, are involved in processing appeals. Each appeal made to the Commissioner is assigned to an individual Appeals Officer who is responsible for the appeal to the point where it is scheduled for an inquiry.

General Legal Services

The Director of Legal Services and legal staff provide opinions and other general legal services to the Commissioner's Office. Duties include analysis of comparative legislation in other jurisdictions; reviewing relevant court decisions; preparing commentaries on information and privacy issues as they arise; and providing legal opinions to Appeals Officers on issues that arise in the context of an appeal.



TOM WRIGHT, LL.B., Director
Tom was Senior Solicitor with the Attorney General's Support and Custody Enforcement Branch before being appointed Director of Legal Services at the Commissioner's Office. Tom has also practised privately with several law firms where he specialized in family law and litigation.

Compliance

The Compliance Branch is responsible for all aspects of the *Act* which relate to the protection of personal privacy. The branch ensures that all institutions comply with the provisions of the *Act*, and develops policies on timely privacy issues such as data linkage through computer matching, the use of unique personal identifiers such as the Social Insurance Number, and the quality and accuracy of information stored in government databases.

The Compliance Branch is divided into 3 units:

Audit and Compliance Investigations

Protecting the informational privacy of the public and monitoring the government's compliance with the requirements of the *Act* requires the development and implementation of thorough audit practices and procedures for compliance investigations. The unit also monitors government policies for the collection and disposal of personal records.

Computer Systems

The systems unit is responsible for the design and installation of necessary computer hardware and the development and implementation of software requirements. Included are the implementation of computerized tracking systems, databases, automated reports, etc. Word and data processing services are also handled by this unit.

Research and Statistics

This unit conducts research and program evaluation for various aspects of the Commission's operation. Staff are responsible for monitoring the data collection techniques of all institutions to ensure consistency of methodology regarding reporting practices in the requisite annual reports. Research activities include the design of forms, surveys and questionnaires; detailed study and analysis of trends, methodologies and information practices of government institutions; development of effective procedures for compilation and tracking of information throughout the government; and the collection and compilation of annual reports from all institutions and preparation of the Commissioner's annual report to the Legislature.



ANN CAVOUKIAN, Ph.D., Director
Prior to being appointed Director of Compliance at the Commissioner's Office, Ann was the first Director of Corporate Resources for the Canadian Auto Workers' Legal Services Plan. Ann has held a number of positions with Ontario's Ministry of the Attorney General, her last appointment being Chief of Research Services.

Administration

The Administration Branch is divided into 2 units:

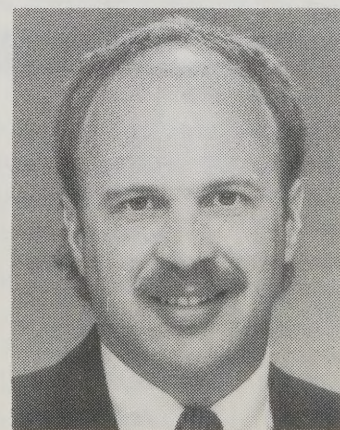
General Operations

The Branch provides general operational support to the Commissioner's Office, including budget preparation, monitoring and administration; financial analysis; establishment of administrative policies and procedures; support services, including purchasing, equipment maintenance, printing, and office leasing; human resource functions, including recruitment, staff training and development, and benefits administration; and ongoing liaison with the Board of Internal Economy and various offices and departments of the Legislative Assembly. Security, and French language services are also handled by this Branch.

As of July 1, the Commissioner's Office has recruited a total of 25 full-time staff, and this is expected to grow to the initial complement of 34 employees within the next several months. The Office has 3 bilingual positions, and is currently providing information services and conducting appeals in both English and French.

Communications

The Branch is also responsible for implementation of the Commission's communications plan and all outreach/public education programs. Staff are currently in the process of producing a general interest brochure and a video, both of which have been targeted for distribution during the summer months.



TOM MITCHINSON, LL.B., Director
Prior to being appointed Director of Administration at the Commissioner's Office, Tom was the Ontario Legislature's first Director of Information Services. Tom has also held the positions of Assistant Secretary to the Board of Internal Economy and Researcher with the Legislative Assembly.

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Commissioner

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Appeals Officer
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Senior Policy Advisor
Manager of Compliance Investigations
Word Processing Operator
Secretary - Director of Legal Services
Appeals Officer
Appeals Officer
Lawyer/Researcher
Manager of Appeals
Admin. Assistant - Compliance
Director of Administration
Secretary to Commissioner
Manager of Communications
Bilingual Appeals Officer
Bilingual Receptionist/Clerical Assistant
Appeals Officer
Appeals Officer
Executive Assistant
Word Processing Operator
Director of Legal Services
Bilingual Information Officer

This is the first issue of our newsletter and covers topics of interest to individuals working with freedom of information and privacy legislation, as well as matters of a general nature that may be of interest to others.

Some items will be regular features (eg. 'Commissioner's Message' and 'Summaries of Orders'). The Commissioner's Message will contain commentary on his role as it is developing and the ever-increasing issues that are occurring daily.

Knowing of the interest that exists amongst Freedom of Information and Privacy Co-ordinators, and in an attempt to pass along our experiences to date in a timely manner, this issue has not been published in French. Every effort, however, will be made to include material in French in future issues.

NEWSLETTER

Office of the
Information and Privacy
Commissioner/Ontario

Additional copies of this Newsletter are available by contacting Monica Zeller at (416) 963-3333 or 1-800-387-0073

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NEWSLETTER

Vol. 1 Issue 2

Fall 1988

Commissioner's Message



Sidney B. Linden

A survey of Freedom of Information and Protection of Privacy legislation may lead one to assume that all such legislation is much the same. However, focusing on similarities could result in misunderstandings of some of the unique features of each of these acts. Ontario's *Freedom of Information and Protection of Privacy Act, 1987* stands out as one with several unique features. In our first newsletter we pointed out that Ontario is rare in combining the two subjects of Freedom of Information and Protection of Privacy in one act. In addition to this difference, there are several others that make our system worthy of special attention.

Ombudsman-like function

Other Canadian jurisdictions which have legislated freedom of information systems generally provide a review or an appeal mechanism to requesters of government information who have had their requests denied. The more typical approach has been to make the province's Ombudsman responsible or, at the federal level, to establish ombudsman-like commissioners of access and privacy who are responsible for handling complaints and

resolving disputes. It should be noted however, that the power of these ombudsman-like commissioners is generally limited to making recommendations. In Ontario, the Information and Privacy Commissioner has some responsibilities that are similar to an ombudsman, and others that more closely resemble a judicial officer. His ombudsman-like role comes into play during the mediation stage of the appeal process. After a requester has been denied access by a government institution, he/she may appeal to the Commissioner's office where an Appeals Officer employed by the Commissioner will attempt to mediate the dispute. But if mediation fails, an inquiry is conducted and the Commissioner is required to dispose of the matter. At this point the Commissioner becomes more judge-like as he must issue an order which is binding on all parties, subject only to judicial review.

Ontario model

Ontario and Quebec are the only jurisdictions that give their Information or Privacy Commissioners the power to make binding orders. The *Act* which incorporates this power for the Ontario Commissioner is modeled on the recommendations contained in the Williams Commission, that reported in 1980.

Quasi-judicial function

Ontario's Office of the Information and Privacy Commissioner has been established on a different footing than most other agencies. In keeping with the Commissioner's quasi-judicial function, the Ontario Legislature decided that the Commissioner should have the authority to inspect all records that are the subject of a dispute. No individual record

or class of records is outside his power to inspect, not even cabinet records. This is a rather exceptional power given to an officer of the Assembly. Other provincial and the federal commissioners are restricted in their ability to inspect cabinet records. The underlying premise of the Ontario *Act* is that only by giving this power to the Commissioner can public confidence in the integrity of the Commissioner's review function be assured. The Ontario Legislature did not believe that granting such powers to the Commissioner would compromise the convention of ministerial responsibility. Using cabinet records as an example, the Commissioner is required to determine whether a record claimed by the government to be a cabinet record is in fact a cabinet record. In order to make this determination, he will have to examine the record in question. Once he has agreed that it is a cabinet record, the statutory exemption from disclosure is worded in mandatory language; if it qualifies as a cabinet record it "shall" not be disclosed.

The *Act* gives the Commissioner extraordinary power to decide disputes through the issuance of orders and to inspect all records, but these powers must be exercised within the framework of the rules stipulated in the *Act*. Heads of agencies must abide by the *Act*, and so must the Commissioner.

Tips for FOIPOP Co-ordinators

Tips for Freedom of Information and Protection of Privacy Co-ordinators will appear from time to time. We hope that this will assist co-ordinators in addressing issues raised in individual appeals.

Let the requester know the reason for your decision

In the course of reviewing numerous letters in which the requester was informed by the institution that the record he/she has requested would not be disclosed or that there would be severances, it has become clear that institutions are often not going into sufficient detail as to the sections of the *Freedom of Information and Protection of Privacy Act, 1987* that they believe apply to the record at issue. Sometimes, this lack of clarity has been the only reason for an appeal on the part of the requester - we have settled several appeals simply by getting in touch with the institution, finding out what subsections of the *Act* are believed by the institution to apply and explaining the institution's position to the appellant.

It is definitely worthwhile to include in your letter not only the sections but the subsection(s) which you feel are applicable to the record at issue. The mandatory requirements of subsection 29(1)(b) of the *Act*, which sets out what should be included in a notice of refusal, should be carefully considered.

Some Freedom of Information Co-ordinators have expressed the concern that they are somehow "binding themselves" to whatever subsections they indicate in their notices. This is not necessarily the case. In a recent decision in *Appeal No. 880010*, the Commissioner permitted the institution to raise an additional section of the

Act at the inquiry stage of an appeal. The Commissioner recognizes that the *Act* is new and that as new decisions are released, the views of an institution may change as to how the *Act* applies to the records they have in their custody or control. One consequence of this position is the necessity that at some time during the appeal, all parties be notified of whatever additional sections and/or subsections the other parties are relying upon. To this point, this duty has been taken care of by our office.

Indicating the subsections, as well as the sections of the *Act* relied upon by the institution in making its decision also lets the Commissioner's office get a clear idea of the basis for the decision. The Appeals Officer handling an appeal file will need to know what subsections are at issue, so that he/she can confine the Appeals Officer's Report to those subsections. Otherwise, we have no alternative but to request a response from the institution in respect of every subsection that could possibly apply in the circumstances of the case.

The Commissioner's recent letter to all Freedom of Information Co-ordinators recommended the creation of an index relating each record or part of a record at issue in an appeal with the corresponding sections or subsections of the *Act* that may be applicable. This type of index should make a detailed letter to the appellant much easier to create, and we urge you to consider this practice.

by Judith Keene



JUDITH KEENE, LL.B.
Manager of Appeals

Prior to being appointed Manager of Appeals, where she supervises six appeals officers, Judith was the Executive Assistant to two Public Complaints Commissioners. In her former position, Judith provided policy and program development advice on the handling of police complaints and board of inquiry hearings. She also worked as general counsel of a legal clinic funded by Ontario's Legal Aid plan and, as a researcher, writer and teaching assistant. She has contributed to "Criminal Law Quarterly", the "Canadian Journal of Family Law" and the "Advocate's Quarterly" and authored a book, Human Rights in Ontario, published in 1983.

Compliance/Privacy Issues

The B.C. Telex Incident

On February 25, 1988, confidential files including telexes from the B.C. Government on suspected child abusers were found in a public hallway of a provincial government building.

An OPP investigation discovered that the telex service at the Ministry of Government Services (MGS) - from which the files went missing - is operated by the electronic mail unit of the government mail service. It appears that due to insufficient storage space, the hallways were often used for temporary storage. While the OPP concluded that there was no criminal conduct involved in this incident, they noted the "lax storage and disposal procedures" relating to these files.

An internal investigation of procedures by MGS concluded that this incident occurred "as a direct result of a lack of formal operating procedures". They have, therefore, formulated comprehensive guidelines for the physical security of telex equipment and communications. Specifically, they have recommended that all telexes currently held by MGS be destroyed and that copies of telexes no longer be sent to them. Within the electronic mail unit, telex copies should be placed on a schedule for proper record keeping and destroyed within 30 days.

Because of the personal and confidential nature of the information in some of the telexes, MGS felt that public access to them (by locating them in a public hallway) may have contravened the provisions of the *Freedom of Information and Protection of Privacy Act, 1987*.

The Information and Privacy Commissioner was very pleased with the thoroughness of both investigations conducted by the OPP and MGS. The range of the recommendations made by MGS were very extensive in its scope. The Commissioner and Ann Cavoukian, Director of Compliance, recently met with Mr. Caplice, Deputy Minister of MGS, who advised them that all of the recommendations made in the report had already been implemented.

While we regret the occurrence of this incident, the end result was a positive one — it led to the development of formal procedures regarding the storage and security of sensitive personal information.

Do You Know What Your Credit Rating Is?

When was the last time (if ever) you checked your credit rating in order to review the accuracy of the information contained therein? How complete is this information — such as who your present employer is? You may be surprised at what you find. I certainly was. I urge each and every one of you to go to the Credit Bureau of Greater Toronto, 60 Bloor St. West (at Bay and Bloor), on the 12th Floor, to review your credit rating. Each consumer has the right to inspect their own credit file and request that any information considered to be inaccurate be corrected by the Credit Bureau.

In addition, a recent amendment to the *Consumer Reporting Act R.S.O. 1980, c.89*, now requires notification to the credit subject whenever a request for a credit rating is made. Thus, your credit rating can no longer be checked without your knowledge. This should hopefully eliminate unauthorized screening of credit files.

These amendments to the *Act* represent a very progressive development for consumers in Ontario. Despite any notification provisions, however, if the information contained in your credit file is inaccurate, then the wrong information will be released to those requesting credit reports. It is incumbent upon you to ensure the accuracy of this information. Check it out!

Saying No to SIN

Federal Privacy Commissioner John Grace applauded the Federal Government's announcement to restrict its use of the Social Insurance Number (SIN). Mr. Grace warned of the danger of allowing the SIN to become a "defacto national identifier" especially in light of the potential to build detailed dossiers on individuals by linking information in various data bases through computer matching. The new policy fortifies privacy protection and sets an example for the private sector and other governments. Specifically, the new SIN policy as outlined in the Annual Report of the Privacy Commissioner (1987-88) is the following:

- *freeze further collections and uses of the SIN by government, unless authorized by Parliament;*
- *review all existing collection and uses of SIN to ensure compliance with the Privacy Act;*
- *require that all not statutorily mandated existing collections and uses of SIN be discontinued;*
- *permit no right, benefit or privilege to be withheld, nor any penalty imposed on an individual for refusing to provide a SIN, except where collection is required by statute;*
- *inform individuals of the purposes for which a SIN is requested.*

This new policy is a very progressive step towards privacy protection and we look forward to its implementation.

by Ann Cavoukian

The following are excerpts from two speeches made recently by the Commissioner when he addressed the American Society of Access Professionals in Washington, D.C. and the Canadian Bar Association (Research and Policy Analysis Section) in Toronto.

"In (the American) system, commercially sensitive information, like trade secrets, is specifically exempted from disclosure, though an agency is given considerable discretion in deciding whether to release this type of information. If the agency decides to disclose commercial information, the company whose information is to be released must also go to the courts to try to reverse the agency's decision.

"This has led to a great volume of 'reverse Freedom of Information Act suits', where businesses seek to protect the information they have provided to the government from disclosure to third parties, often their competitors.

"In Ontario, the equivalent exemption in our Act uses mandatory language to protect this type of information. When our government institution decides that the information does not fit within the exemption, that is, it is not sufficiently sensitive to warrant protection from disclosure, the institution must contact the company involved and provide them with an opportunity to argue against such release."

"Our office will review the records to determine whether they do or do not fall within the exemption claimed or any other exemption and if our decision is that they do not, we will order that the records be disclosed.

"There are certain advantages to this approach. As everyone knows, resort to the courts is costly for individual appellants and very time consuming. Furthermore, unless all the cases are heard by one court, there is a strong likelihood that rulings issued by different courts will be inconsistent. Our legislators felt that some of these problems would be lessened, if not eliminated, by the creation of the Commissioner's Office.

"Under our system, an independent review of government decisions is accessible to all, quickly and at no cost."

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